DR ESA KAMARUZAMAN v. DR NEVILLE MICHAEL GOMIS & ORS

COURT OF APPEAL, PUTRAJAYA
SEE MEE CHUN JCA
LIM CHONG FONG JCA
AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: M-02-(NCvC)-1139-06-2022]
26 NOVEMBER 2024

Abstract – *A medical practitioner, who is proven to have failed to insert a proper central venous line ('CVL') into the left side of a patient's neck, causing air embolism, which caused or materially contributed to the patient's death, should be held responsible and liable, especially if an expert witness testified that if proper care had been exercised during and after insertion or during its removal, it could have picked up the fractured CVL which was not properly occluded. When there is a nexus between the unsuccessful attempt to insert the CVL on the patient and the medical practitioner, the latter had breached his medical professional duty of care, contributing to the deterioration of the patient's condition leading to premature death.*

TORT: *Negligence – Medical negligence – Liability – Duty of care – Breach – Deceased died due to 'Hypoxic Ischaemic Encephalopathy Post Cardiac Arrest' and 'Hypovolemic Shock' – Whether fractured central venous line ('CVL') not properly occluded materially contributed to deceased's death – Whether proper care exercised during and after insertion or during removal of CVL – Whether medical practitioner who unsuccessfully inserted CVL ought to be responsible for death of deceased – Whether there was breach of medical profession duty of care*

TORT: *Negligence – Medical negligence – Damages – Claim for – Quantum of damages – Assessment – Aggravated damages – Whether sum awarded manifestly high – Whether ought to be substituted with more reasonable sum*

This was an appeal by the appellant ('third defendant') against the decision of the High Court Judge ('HCJ') in allowing the claim of the first respondent ('plaintiff') against the third defendant in a medical negligence action. On 2 May 2015, the deceased was first seen by the second defendant, a consultant obstetric and gynaecologist, when she was at five weeks gestation to confirm pregnancy. She had irregular menses and subfertility due to some medical condition. From thereon, the deceased had nine antenatal visits with the second defendant. The deceased's estimated date of delivery was on 30 December 2015. On 12 December 2015, at around 6am, before the estimated date of delivery, the deceased was admitted to the first defendant's medical centre with labour pains. At around 11.30am the deceased requested for epidural for labour pain relief. In response to the deceased's request, the

second defendant made a referral to the third defendant for epidural anaesthesia to be provided to the deceased. At around 12.55pm, the deceased delivered a baby girl, of 3.05kg. The estimated blood loss was 350ml. The episiotomy site was sutured after delivery of the placenta and membrane. The record indicated that the deceased's uterus well-contracted after intravenous oxytocin. At around 2pm, the deceased was bleeding from the episiotomy site as well as from vaginal wall tears sustained during the delivery process and the second defendant removed the tampon from the vagina. Arrangement was made for re-suturing. The second defendant called for the third defendant to administer epidural. Subsequently, at around 5.05pm, while the second defendant was talking to the deceased, the deceased suddenly closed her eyes and became unarousable and unresponsive ('first collapse'). Code Blue was activated. A multidisciplinary team which included the third defendant assisted the second defendant in resuscitating the deceased. After around five minutes of resuscitation efforts, the deceased was successfully revived. A central venous line ('CVL') was also inserted by the third defendant. At around 6.10pm, the deceased was transferred to the intensive care unit (ICU) for further stabilisation. She was connected to a mechanical ventilation. In the meantime, a blood test result showed that the deceased had disseminated intravascular coagulation ('DIVC'), a condition which had to do with blood flow. The second defendant carried out examination under general anaesthesia, administered by the third defendant to examine the defendant's cervix and uterus. A decision was made to continue blood transfusion to correct the DIVC. The deceased had per vagina bleeding and was given IM Haemabate by the second defendant. Plans were made to re-pack the vagina. On 1 December 2015, at about 12.50am, the deceased was seen by the third defendant, who noted that the central venous pressure (CVP) reading was ten and ordered that intravenous lasix 20mg be administrated. The deceased was being transfused blood at the same time. The deceased's DIVC was subsequently corrected. On 14 December 2015, at 11.45pm, the deceased had a second episode of cardio-pulmonary collapse ('second collapse') and Code Blue was activated. On 15 December 2015, at around 12.30am, the deceased started to have fits and seizure and was diagnosed to have status epilepticus secondary to hypoxic-ischemic by the neurologist and was managed accordingly. On 21 December, at around 4.47pm, the deceased was certified to be brain-dead (Hypoxic Ischemic Encephalopathy Post Cardiac Arrest) and was pronounced dead. The plaintiff brought the claim on his behalf as well as on behalf of the estate of the deceased. He claimed that the defendants were negligent, in that, they had breached their statutory, contractual and/or other duties owed to the deceased. He claimed that the defendants had not exercised reasonable care, skill and diligence, had not acted in good faith causing injuries, loss and damage suffered by the plaintiff, the deceased, the deceased's estate and the dependents. The HCJ made a finding of fact that there had been an unrecorded failed attempt by the third defendant to insert the CVL into the

deceased's left neck. An X-ray taken on 15 December 2015 revealed a broken catheter tip on the left of the deceased's chest which remained *in situ*, which had caused the deceased to suffer a left-sided pneumothorax and air embolism, materially contributing to the deceased's death. In respect of the first defendant, it was held that it was vicariously liable for the negligence of the third defendant and also liable for the breach of its non-delegable duty of care. In holding the second defendant not liable, the HCJ found that the second defendant had duly managed the post-partum haemorrhage and had promptly conducted a comprehensive examination to ascertain the cause of the post-partum haemorrhage. The third defendant appealed against the said decision. The issues that arose were (i) whether the HCJ was justified in finding the third defendant negligent and liable for the death of the deceased; and (ii) whether the HCJ was justified in awarding the quantum of damages.

Held (dismissing third defendant's appeal on liability)
Per Azhahari Kamal Ramli JCA delivering the judgment of the court:

(1) The cause of death of the deceased was due to 'Hypoxic Ischaemic Encephalopathy Post Cardiac Arrest' and the 'Disease or condition that directly caused the death' was 'Hypovolemic Shock'. These two data must be considered in the light of the evidence of Professor Dr Chan You Kuen (PW3) who testified that the deceased's complaint of chest pain and lower limb numbness were consistent with air embolism secondary to air entering her vasculature and the deceased's second cardiac arrest was also consistent with further air embolism. PW3 further stated that a fractured CVL line not properly occluded was the cause of the air entering the vasculature. PW3 opined that the fractured left CVL catheter which was not properly closed up (occluded) was the cause of the air embolism that had caused or materially contributed to the deterioration suffered by the deceased which had then caused or materially contributed to her death. PW3 also testified that the fractured CVL could have been picked up if proper care had been exercised during and after insertion or during its removal. (para 58)

(2) The expert witness for the plaintiff had made it clear that the unsuccessful insertion of the CVL had materially contributed to the death of the deceased. It followed that the person who had attempted the unsuccessful insertion of the CVL on the deceased's left neck should be responsible for the death of the deceased. In this respect, the HCJ, after hearing the witnesses, came to his conclusion that the third defendant was the person who had attempted to unsuccessfully insert the CVL. This was a finding of fact that this court, at the appeal stage, should not interfere with. In this regard, the HCJ considered the fact that only the third defendant was called by the second defendant to assist in managing the pain experienced by the deceased during her delivery process.

A Further, the HCJ also referred to the third defendant's agreement during cross-examination that normally an anaesthetist would have inserted the CVL. On this issue, there was a nexus between the unsuccessful attempt to insert the CVL on the left side of the deceased's neck and the third defendant, hence the third defendant had breached his medical
B professional duty of care which materially contributed to the deterioration in the deceased's condition which led to her premature death. The HCJ could not be said to have misdirected himself on fact or law before arriving at his conclusion. (paras 59-61)

(3) Pursuant to s. 69(4) of the Courts of Judicature Act 1964 ('CJA'), this
C court was empowered to, among others, draw inferences of fact from the evidence. Invoking s. 69(4) of the CJA, the plaintiff's evidence that the third defendant was the only one who attempted the CVL on the left of the deceased, which was not recorded in the record of the first defendant, as credible evidence pointing to the negligent act of the third
D defendant. There was no appealable error in the decision of the HCJ on the issue of liability. (para 65)

(4) It is trite law that damages are compensatory in nature awarded to compensate for loss sustained as a result of a civil wrong committed in breach of a duty of care. The plaintiff claimed that the deceased was
E earning RM6,000 a month and she earned extra income of RM1,200 as a locum at some private clinic and this amount was taken into consideration by the HCJ as the deceased's loss of earnings. The HCJ was justified in considering the deceased's income as a locum in assessing the loss of income. It is common knowledge that doctors,
F especially those serving in Government hospitals, do extra work as a locum at private hospitals or clinics to earn extra income. (paras 68-71)

(5) The plaintiff's father-in-law (PW4)'s evidence corroborated the plaintiff's claim for costs of engaging a maid to give care service to the plaintiff's daughter from the date of delivery until the date of decision.
G The amount awarded by the HCJ was RM48,000. The plaintiff and PW4 had given valid explanation as to the need of having the maid. The parents-in-law of the plaintiff were getting old and they needed the assistance of a maid to look after the daughter. This claim was reasonable as it was also quite common that young couples also engaged
H the assistance of a maid to look after their children at home whenever they work. The award of RM1,000 per month was reasonable, taking into account the minimum wage of RM1,200 per month at that material time. It is also reasonable that services of the maid is needed until the daughter is 18 years old. Considering that the plaintiff's parents- in-law
I were old and that the plaintiff was working, it was reasonable for the plaintiff to continue engaging the maid to look after the needs of the daughter. (paras 72 & 73)

(6) While the defendants had their right to defend the plaintiff's claim against them, their failure to offer any expert opinion of the 'respected members of the medical profession' to negate the finding of the plaintiff's experts but at the same time trying to push the liability to other defendants showed the lack of sincerity in handling the plaintiff's claim. The HCJ was correct in awarding aggravated damages to the plaintiff. However, the HCJ's award in the sum of RM500,000 for aggravated damages was manifestly high. The sum of RM100,000 was more reasonable. (paras 76 & 77)

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***
Bolitho v. City & Hackney Health Authority [1997] 4 All ER 771 ***(refd)***
Cassidy v. Ministry Of Health [1951] 2 KB 343 ***(refd)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***
Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***
Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(refd)***
Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***
Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal [2024] 6 CLJ 487 FC ***(refd)***
Pantai Medical Centre Sdn Bhd v. Fareed Reezal Arund & Another Appeal [2022] 2 CLJ 173 CA ***(refd)***
Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh [1997] 3 CLJ 225 CA ***(refd)***
Rogers v. Whitaker (1992) 175 CLR 479 ***(refd)***
Siow Ching Yee (Menyaman Melalui Isteri Dan Wakil Litigasinya, Chau Wai Kin) v. Columbia Asia Sdn Bhd [2024] 4 CLJ 173 FC ***(refd)***
Woodland v. Swimming Teachers Association And Others [2014] AC 537 ***(refd)***
Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors [2017] 8 CLJ 605 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(4)

Other source(s) referred to:

Puteri Nemie Jahn Kassim, *Medical Negligence In Malaysia Cases and Commentary*, 2nd edn p 37

For the appellant - Barvina Punnusamy & Sabrina Ahmad Kamal; M/s Jayadeep Hari & Jamil
For the 1st respondent - Manmohan Singh Dhillon & Alicia Chin; M/s PS Ranjan & Co
For the 2nd respondent - Felix Raj & Fazliza Azli; M/s Felix Raj Chambers
For the 3rd respondent - Aw Ee Va & Ahmad Aizek Busu; M/s Chan Ban Eng & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

Azhahari Kamal Ramli JCA:

Introduction

B **[1]** This is an appeal by the appellant (the third defendant in the court below) against the decision of the learned High Court Judge (HCJ) dated 26 May 2022 in allowing the claim of the first respondent (the plaintiff in the court below) against the appellant in a medical negligence action.

[2] In the High Court, the first respondent sued the following defendants:

C (i) Mahkota Medical Centre Sdn Bhd (as the first defendant);

(ii) Dr Nor Azlina binti Awang (as the second defendant);

(iii) the appellant (as the third defendant); and

(iv) Dr Thirugnana Sambanthan (as the fourth defendant)

D **[3]** The claim against the fourth defendant was subsequently withdrawn. After a full trial, the learned HCJ ordered, among others, that:

(i) the plaintiff's claim against the appellant be allowed;

(ii) the plaintiff's claim against the first defendant was allowed on the E principle of vicarious liability and non-delegable duty;

(iii) the plaintiff's claim against the second defendant was dismissed; and

(iv) the first defendant's claim for a contribution or indemnity from the third defendant is allowed.

F **[3]** The claim against the fourth defendant was subsequently withdrawn. After a full trial, the learned HCJ ordered, among others, that:

(i) the plaintiff's claim against the appellant be allowed.

(ii) the plaintiff's claim against the first defendant was allowed on the G principle of vicarious liability and nondelegable duty.

(iii) the plaintiff's claim against the second defendant was dismissed.

(iv) the first defendant's claim for a contribution or indemnity from the third defendant is allowed.

H **[4]** In respect of damages, the learned HCJ made the following order:

(i)	general damages	- RM100,000.00
(ii)	aggravated damages	- RM500,000.00
I (iii)	loss of income (deceased's monthly income at RM6,000 add RM1,200 per month for part time locum work at some private clinic less RM2,000 as living expenses for 16 years)	- RM998,400.00

(iv) pre-trial damages being the cost of engaging maid at RM1,000 per month for 48 months - RM48,000.00

(v) future damages being the cost of engaging maid services calculated at RM1,000,00 for 12 years until the deceased's daughter reaches the age of 18 years old - RM144,000.00

[5] Dissatisfied with the said decision, the appellant filed this appeal against:

(i) the plaintiff (as the first respondent);

(ii) the first defendant (as the second respondent); and

(iii) the second defendant (as the third respondent).

[6] In this judgment, the parties will be referred to as they were in the High Court.

Factual Matrix Of The Case

[7] The facts of the case can be gleaned from the grounds of judgment, the pleadings and the submissions of the parties, which we would adopt with necessary modifications.

[8] On 2 May 2015, the deceased was first seen by the second defendant being the consultant obstetric & gynaecologist when she was at five weeks gestation to confirm pregnancy. She had irregular menses and subfertility due to some medical condition. From thereon, the deceased had nine antenatal visits with the second defendant. The deceased, at the same time, also had antenatal follow-up at Government clinic. The deceased's estimated date of delivery was on 30 December 2015.

[9] On 12 December 2015, at around 6am, *ie*, before the estimated date of delivery, the deceased was admitted to the first defendant's medical centre. She had labour pains.

[10] At around 9am on the same day, the deceased was admitted to the labour room. A vaginal examination done showed cervical oscillation at 4-5cm, station - 3 and partial effacement. An amniotomy done revealed clear liquor. Oxytocin (2/4 unit) was started.

[11] The deceased's labour progress was uneventful. At around 11.30am, the deceased requested for anepidural for labour pain relief. Cervical dilation was 7cm, and liquor was clear. Oxytocin was at 4 units (45 dpm) and the record showed that uterine contractions were moderately strong.

[12] In response to the deceased's request, the second defendant made a referral to the third defendant for epidural anaesthesia to be provided to the deceased.

[13] At around 12.55pm, the deceased delivered a baby girl, of 3.05kg. The estimated blood loss was 350ml. The episiotomy site was sutured after deliver of the placenta and membrane. The record indicates that the deceased's uterus well-contracted after intravenous oxytocin.

[14] At around 2pm, the deceased was bleeding from the episiotomy site as well as from vaginal wall tears sustained during the delivery process and the second defendant removed the tampon from the vagina. Arrangement was made for re-suturing. The second defendant called for the third defendant to administer the epidural.

[15] At about 3.30pm, the second defendant was informed that the deceased's haemoglobin had dropped to 8.1g/dl and blood pressure was low at 67/34 mmHg. Estimated blood loss from the delivery and subsequent repair of the birth trauma was between 1 litre to 1.5 litre. The second defendant ordered for blood test and two pints of blood transfusion for the deceased. An abdominal ultrasound done showed no retained placenta and that the uterus was well-contracted. The deceased was stable and was taken to the second defendant and the plaintiff. The second defendant left the labour room at around 4.10pm.

[16] At about 4.45pm, the second defendant went to the labour room to conduct another delivery case. The second defendant dropped by to see the deceased at around 5.05pm and the plaintiff was there as well. While the second defendant was talking to the deceased, suddenly the deceased closed her eyes and became unarousable and unresponsive ("the first collapse"). Code Blue was activated.

[17] A multidisciplinary team, which included the third defendant, assisted the second defendant in resuscitating the deceased. After around five minutes of resuscitation efforts, the deceased was successfully revived, and she opened her eyes and had a good cough reflex. A Central Venous Line (CVL) was also inserted by the third defendant. Blood transfusion (two pints packed cells) was started.

[18] At around 6.10pm, the deceased was transferred to the Intensive Care Unit (ICU) for further stabilisation. She was connected to a mechanical ventilation.

[19] The second defendant decided to carry out an examination under general anaesthesia (EUA under GA) to examine the deceased's cervix and uterus and to keep in view the operation to remove the uterus or hysterectomy. Consent was obtained from the plaintiff.

[20] In the meantime, the blood test result which returned showed that the deceased had Disseminated Intravascular Coagulation (DIVC), a condition which has to do with the blood flow.

[21] At around 7pm to 8.20pm, the second defendant carried out an examination under general anaesthesia administered by the third defendant (EUA under GA), to examine the deceased's cervix and uterus. It was noted that the sutures at the episiotomy and previous vaginal wall tears were intact. There was no active bleeding from the episiotomy site and vaginal wall tears except for slight oozing.

[22] A decision was made to continue transfusion to correct the Disseminated Intravascular Coagulation (DIVC).

[23] At around 8.30pm, the deceased was transferred back to the ICU. A referral was made to a cardiologist, Dr Tee Heng Gian, for the deceased to have a cardiac assessment and echogram.

[24] At around 10.40pm, the second defendant was informed that the deceased had per vagina bleeding after she coughed. Her vital sign was noted to be stable. The second defendant gave a verbal order that the deceased immediately be given IM Haemabate (which was a uterotonic drug). Plans were made to re-pack the vagina.

[25] On 13 December 2015, at about 12.50am, the deceased was seen by the third defendant, who noted that the Central Venous Pressure (CVP) reading was ten and ordered that intravenous Lasix 20mg be administered. The deceased was being transfused blood at the same time. The third defendant planned to repeat the blood test after the transfusion. A total four bags of packed cells, ten bags of fresh frozen plasma, four bags of platelets and ten bags of cryo-precipitate were transfused.

[26] At 7.30am, the second defendant reviewed the deceased at the ICU. She noted that the deceased was opening her eyes and nodding her head. Her vital signs were stable and had 100% oxygen saturation, her pulse rate was 94 beats per minute and her blood pressure was 118/52 mmHg. She appeared pink and was showing signs of a fever. Her abdomen was distended but an interval examination did not reveal any blood clots.

[27] At around 9am, she was extubated. Her Disseminated Intravascular Coagulation (DIVC) was corrected, and her coagulation profile was noted to be normal. The third defendant had handed over anaesthetic management to the fourth defendant as he had to leave for Kuala Lumpur.

[28] At 9.45pm, the same day, the second defendant was informed by the staff nurse about the fluid balance and the urine output. The second defendant ordered that the intravenous fluids be stopped and the deceased be allowed to drink clear fluids. She also planned to repeat the electrolytes the following day.

[29] On 14 December 2015 at around 8.20am, the second defendant reviewed the deceased. The deceased's potassium level was recorded as 3.8 mmol/L, which led the second defendant to form the opinion that the deceased was fit to be transferred to the ordinary ward. She also planned to see the deceased in the clinic to inspect the episiotomy wound.

[30] At around 9.30am, the deceased was seen by the fourth defendant, who noted that she was well, and her vital signs were stable. He also noted that the coagulation profile was normal. The deceased, however, complained of slight numbness in the lower limbs. He planned to remove the epidural catheter and other attendant procedures. He also planned to perform a magnetic resonance imaging (MRI) of the lower spine if the numbness persisted.

[31] At around 11am, the deceased was transferred to the ordinary ward. Subsequently, the deceased was wheeled in a wheelchair by the plaintiff to see the second defendant at her clinic. The second defendant carried out a speculum examination and abdominal ultrasound, which showed the uterus was well-contracted, and the episiotomy wound was clean and not swollen and the sutures were intact.

[32] At around 2.40pm, the fourth defendant reviewed the deceased, and noted that she had less numbness and was ambulating well. The record showed that the deceased was able to urinate and defecate.

[33] Subsequently, in the ward, the deceased was noted to be ambulating and eating well and breastfeeding her baby. The deceased was reviewed again by both the second and fourth defendants later that day. There were no changes to the overall management plan.

[34] At around 9.05pm, the second defendant was informed that the deceased requested for a cough syrup of Benadryl Formula for her cough. The second defendant gave a verbal order that the deceased be given Benadryl 20ml only, and that input/output monitoring be continued.

[35] At around 11.45pm, the deceased had a second episode of cardio-pulmonary collapse ("the second collapse"). The plaintiff, who was with her at that time, intubated her and initiated the resuscitation. Dr Quan Chew Owi and medical officers then attended to the deceased. Dr Wu Khai Syan, an anaesthesiologist with the first defendant's medical centre also attended to her. Her pupils were 3mm in diameter and were reactive bilaterally. Her blood pressure was 170/100 mmHg and her pulse rate was 120 beats per minute. Her lung was clear and her oxygen saturation was 100%. However, she was not responding to call.

[36] The second defendant was informed that the deceased had collapsed, and Code Blue had been activated. The second defendant went to see the deceased at the Intensive Care Unit (ICU), and it was noted that her uterus was well-contracted and there was no active bleeding. The second defendant

requested the cardiologist to repeat an echogram to ascertain whether there was any cardiac cause for the collapse. The results of the echogram were normal.

[37] On 15 December 2015 at around 12.30am, the second defendant noted that the deceased started to have fits and seizure. The deceased was initially treated by the anaesthetist, Dr Wu Khai Syan, and the second defendant subsequently referred the deceased to a neurologist, Dr Mooi Chin Leong, for further management.

[38] The deceased was diagnosed to have status epilepticus secondary to hypoxic-ischemic by the neurologist and was managed accordingly.

[39] As further investigations showed proteinuria, hypoalbuminemia and coagulopathy, the second defendant, after further discussion among the managing consultants, ordered for the deceased to be given IV Magnesium Sulphate, Disseminated Intravascular Coagulation (DIVC) regime and IV Vitamin K as part of the management for the possibility of eclamptic seizure/ eclampsia.

[40] Following discussion with the plaintiff and the deceased's parents, who agreed for the deceased to be transferred to the Melaka Hospital for further treatment and management in view refractory status epilepticus, arrangements were made for the deceased to be transferred to the Melaka Hospital accordingly.

[41] In the meantime, and pending the transfer, computed tomography (CT) scan of the brain done at around 3.10am showed no intracranial bleeding/oedema/infract. As a chest radiograph (x-ray) showed bilateral lungs opacities suggestive of pulmonary oedema. The neurologist ordered for the deceased to be given IV Frusemide 40mg stat.

[42] Between 4am and 4.05am, the deceased was transferred to the Melaka Hospital for further management.

[43] Subsequently, on 21 December 2015, at around 4.47pm, the deceased was certified to be brain-dead (hypoxic ischemic encephalopathy post cardiac arrest) at Melaka Hospital and she was pronounced dead there on the same day. She was 28 years old.

[44] The plaintiff brought the claim on his own behalf as well as on behalf of the estate of the deceased. He claimed that the defendants were negligent in that they have breached their statutory, contractual and/or other duties owed to the deceased. He claimed that the defendants had not exercised reasonable care, skill and diligence, had not acted in good faith, causing injuries, loss and damage suffered by the plaintiff, the deceased, the deceased's estate and the dependants.

A **The Summary Of The Decision Of The Learned HCJ**

[45] Based on the evidence before him, the learned HCJ made a finding of fact that there had been an unrecorded failed attempt by the third defendant to insert the Central Venous Line (CVL) into the deceased's left neck. This failed attempt was not documented in the medical report. However, there
B were entries written by two nurses on 13 December 2015 and 14 December 2015 that documented a haematoma and a bruise on the left side of the deceased's neck. The x-ray taken on 15 December 2015 revealed a broken catheter tip on the left of the deceased's chest, which remained *in situ*. This broken catheter tip had caused the deceased to suffer a left-sided
C pneumothorax and air embolism, which materially contributed to the deceased's death. The learned HCJ also found that the third defendant was the one who had attempted to do the unsuccessful Central Venous Line (CVL) insertion and was responsible for the death.

[46] In respect of the first defendant, it was held that the second and third
D defendants are consultants practicing in the first defendant's medical centre. Despite the first defendant's contention that the second and third defendants are independent contractors, both the second and third defendants were expected to participate in talks and forums organised by the first defendant to promote the medical centre as a centre of excellence and the preferred
E healthcare facility. The learned HCJ finds that in the first defendant's website, the first defendant also describes its consultant as 'our consultant' and there is some control as to prevent the doctors from crossing their discipline or speciality. The consultants are expected to make business trips to Indonesia for marketing purposes. The consultant also must abide by the
F first defendant's rules and regulations. According to the learned HCJ, the deceased and the plaintiff chose the first defendant because of its good reputation. Based on those facts, the learned HCJ held that the first defendant is vicariously liable for the negligence of the third defendant and also liable for the breach of its non-delegable duty of care.

G **[47]** In holding that the second defendant was not liable, the learned HCJ found, among others, she had duly managed the post-partum haemorrhage including re-sutured the tear and bleeding episiotomy. The learned HCJ also found that the deceased had recovered after the blood transfusion given after the first collapse. With regard to the delay in undertaking a blood
H transfusion, which caused the deceased to suffer a prolonged period of shock, the learned HCJ found that the second defendant was not liable. This was because the second defendant had promptly conducted a comprehensive examination to ascertain the cause of the post-partum haemorrhage and had also taken necessary measures to prevent the deceased from developing
I Disseminated Intravascular Coagulation (DIVC).

Analysis And Finding Of This Court

[48] Before proceeding further, it is pertinent to note that the plaintiff did not appeal against the finding of the learned HCJ in absolving the second defendant from any liability. It is also pertinent to note that the first defendant did not appeal against the decision of the learned HCJ, probably on the grounds that the learned HCJ had allowed the first defendant's claim for contribution or indemnity against the third defendant. The issue of vicarious liability and breach of non-delegable duty of care is not relevant in this appeal. Hence, in this judgment, we will confine ourselves to the third defendant's appeal.

[49] We have carefully considered the appeal record, especially the memorandum of appeal and of the view that the appeal can be determined on the following issues:

(i) whether the learned HCJ is justified in finding the third defendant is negligent and liable to the death of the deceased.

(ii) whether the learned HCJ is justified in awarding the quantum of damages.

[50] We shall start by reminding ourselves of the law regarding the applicable standard of care for s doctor, as the third defendant in this appeal. In the case of *Zulhasnimar Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors* [2017] 8 CLJ 605; [2017] 5 MLJ 438, Raus Sharif JCA (as he then was) on behalf of the Federal Court opines that the "reasonable prudent patient" test propounded by the Australian case of *Rogers v. Whitaker* [1992] 175 CLR 479 which was adopted by the Federal Court case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593 is only restricted to the determination of the standard of care for a doctor's duty to advice or provide information of risks in relation to any proposed treatment. The "reasonable prudent patient test" is not applicable in determining the standard with regards to a doctor's duty to diagnose and treat. Hence, in determining the standard of care for diagnosis and treatment, the *Bolam* test still applies, subject to qualifications decided by the House of Lords in *Bolitho v. City & Hackney Health Authority* [1997] 4 All ER 771.

[51] The *Bolam* test was introduced in the case of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118, which states:

> ... A doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by responsible body of medical men skilled in that particular art. Do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting in the other way round, a doctor is not negligence, if he is acting in accordance with such a practice merely because there is a body of opinion that takes a contrary view.The test is the standard of the ordinary skilled man

A exercising and professing to have that special skill. A man need not possess the highest skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

[52] The "qualifications" in the applicability of *Bolam* test is proposed by B Lord Browne-Wilkinson in *Bolitho v. City & Hackney Health Authority* (*supra*), which held that the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnose just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment and diagnose accorded with sound medical practice. C The court also held that before the judge can accept the body of opinion as being "responsible", the judge will have to be satisfied that "... in forming their views, the experts have directed their minds to the question of comparative risks and benefit and have reached a defensible conclusion on the matter." If it can be demonstrated that the expert medical opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the D body of opinion is not responsible. In essence, the court states:

> A doctor could be liable for negligence in respect of a diagnosis and treatment despite a body of professional opinion sanctioning his conduct but where his professional opinion was not capable of withstanding logical analysis. In such situation, the court is entitled to hold that the body of E opinion was not reasonable of responsible.

[53] It is to be reiterated that the first defendant is not appealing against the decision of the learned HCJ on the issue of vicarious liability and non-delegable duty of care. However, for completeness, this doctrine provides that all healthcare providers will be vicariously liable for the acts and F conducts of their employees such as doctors, nurses and medical attendants, provided that the employee was acting "in the course of employment" (see *Cassidy v. Ministry Of Health* [1951] 2 KB 343). On the other hand, non-delegable duty of care concerns a primary liability imputed to a party not just to take responsible care but to ensure that reasonable are is taken. G In the case of *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2018] 1 MLJ 685, the Federal Court held that the doctrine of non-delegable duty of care as expounded in the case of *Woodland v. Swimming Teachers Association And Others* [2014] AC 537 could extend to private health care institutions such as the hospital in relation to doctors, who H is independent contractors, performs medical treatment within its facilities (see also *Siow Ching Yee (Menyaman Melalui Isteri Dan Wakil Litigasinya, Chau Wai Kin) v. Columbia Asia Sdn Bhd* [2024] 4 CLJ 173; [2024] 3 MLJ 66).

[54] In the present case, it is not disputed that the controversy that led to the death of the deceased relates to the diagnosis and treatment carried out I by the doctors when attended to her during the delivery process. Hence, the

"reasonable prudent patient" test is not applicable but the court must consider the expert opinion of the respected members of the medical profession. In the event that there are differences in opinion of the experts, the court would have to decide the standard of care for the diagnose and treatment in that particular case.

Whether The Learned HCJ Is Justified In Finding The Third Defendant Negligent And Liable To The Deceased's Death

[55] The third defendant's main contention in this appeal is that the learned HCJ had erred in finding the third defendant liable in negligence. It was submitted that there was a misdirection in law and in fact by the learned HCJ, who stated that the issue to be tried was solely the failed attempt to insert the CVL into the left side of the deceased's neck, which caused the left-sided pneumothorax and air embolism. The learned HCJ had missed another important issue, *ie*, the second defendant's mismanagement of the delivery and post-partum haemorrhage, which supported the maternal death report issued by the Kementerian Kesihatan Malaysia that the cause of the deceased's death was 'Hypoxic Ischemic Encephalopathy Post Cardiac Arrest and the underlying condition which resulted in the condition to be severe post-partum haemorrhage'. It was also the third defendant's case that he did not attempt to insert the CVL on the left side of the deceased's neck, but he had only inserted a CVL on the deceased's right internal jugular vein. It was further submitted that the insertion of the CVL can be done by any doctor, not only by a consultant anaesthesiologist.

[56] As against the second defendant, the third defendant submitted that the second defendant is responsible for the death of the deceased based on the evidence of the plaintiff's expert witness that there was delayed intervention, on the second defendant's part, in identifying the cause of the post-partum haemorrhage, delayed volume replacement and blood transfusion. Further, the third defendant also contended that the maternal death report had stated that the cause of the deceased's death was 'Hypoxic Ischemic Encephalopathy Post Cardiac Arrest and underlying condition which resulted in the condition to be severe post-partum haemorrhage', of which the management of severe post-partum haemorrhage was under the control and care of the second defendant. Hence, the third defendant maintains that he is not liable for the death of the deceased.

[57] We are of the opinion that the issue of liability of either the second defendant or the third defendant would depend on the determination of the cause of death of the deceased. In this respect, the third defendant is relying on the maternal death report, which was prepared in the following format:

15. Sebab-sebab kematian (mengikut panduan ICD berdasarkan hasil siasatan Jawatankuasa Teknikal Siasatan Kematian Ibu Peringkat Daerah)	Hypoxic Ischaemic Encephalopathy Post Cardiac Arrest
15.1 Penyakit atau keadaan yang menyebabkan kematian secara langsung **ia tidak bermaksud kaedah/cara kematian *eg*, heart failure, respirotary failure dll la bermaksud penyakit, kecederaan atau komplikasi yang menyebabkan kematian	Hypovolemic Shock
15.2 Sebab atau factor yang menyebabkan penyakit atau keadaan di atas (Nyatakan penyakit asas (underlying condition) pada barisan terakhir)	Severe post-partum haemorrhage

[58] The above report clearly shows that the cause of death of the deceased was due to 'Hypoxic Ischaemic Encephalopathy Post Cardiac Arrest' and the 'Disease or condition that directly caused the death' was 'Hypovolemic Shock'. These two data must be considered in the light of the evidence of Professor Dr Chan You Kuen (PW3), who testified that the deceased's complaint of chest pain and lower limb numbness were consistent with air embolism secondary to air entering her vasculature and the deceased's second cardiac arrest is also consistent with further air embolism. PW3 further states that a fractured CVL line not properly occluded was the cause of the air entering the vasculature. PW3 opined that the fractured left CVL catheter which was not properly closed up (occluded) was the cause of the air embolism that had caused or materially contributed to the deterioration suffered by the deceased, which had then caused or materially contributed to her death. PW3 also testified that the fractured CVL could have been picked up if proper care had been exercised during and after insertion or during its removal.

[59] The expert witness for the plaintiff had made it clear that the unsuccessful insertion of the CVL had materially contributed to the death of the deceased. It follows that the person who had attempted the unsuccessful insertion of the CVL on the deceased's left neck should be responsible to the death of the deceased. In this respect, the learned HCJ, after hearing to the witnesses, came to his conclusion that the third defendant was the person who had attempted to unsuccessful insertion of the CVL. This is a finding of fact that we, at the appeal stage, should not interfere with unless it is shown that, among others, the learned HCJ had fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed

itself and asked the correct questions would have arrived at the same conclusion (see *Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 3 CLJ 225; [1997] 2 MLJ 373).

[60] In this regard, the learned HCJ considered the fact that only the third defendant was called by the second defendant to assist in managing the pain experienced by the deceased during her delivery process. Further, the learned HCJ also referred to the third defendant's agreement during cross-examination that normally an anaesthetist would have inserted the CVL. On this issue, the learned HCJ concluded that there was a nexus between the unsuccessful attempt to insert the CVL on the left side of the deceased's neck and the third defendant, hence the third defendant had breached his medical professional duty of care, which materially contributed to the deterioration in the deceased's condition, which led to her premature death.

[61] We are of the opinion that the learned HCJ was justified in his finding. His finding is supported by the expert witnesses called by the plaintiff. The third defendant did not call any rebuttal expert opinion. Be that as it may, notwithstanding the comment by PW1 (Dr Milton Lum Siew Wah) that there was a delay on the part of the second defendant in recognising the severity of the bleeding suffered by the deceased following the delivery, and the delay in undertaking blood transfusion, which had caused the deceased to suffer prolonged period of shock and eventually the episode of the first collapse, we find that the learned HCJ was not plainly wrong in absolving the second defendant from liability. The learned HCJ found that the second defendant had promptly undertaken a comprehensive examination and investigation to ascertain the cause of post-partum haemorrhage and also had carried out necessary measures to prevent the deceased from developing DIVC. The learned HCJ had the opportunity of assessing the expert report in the light of the underlying facts of the case. In the circumstances, it cannot be said that the learned HCJ had misdirected himself on fact or law before arriving at his conclusion.

[62] The third defendant also submitted that:

> And even more so, when there isn't one single evidence including oral evidence during the course of the trial that it was the third defendant who had attempted the CVL insertion on the left side of the deceased, how can the Learned Trial Judge make the finding that there is nexus with the third defendant and find him negligent for the said act?

[63] However, the plaintiff had given evidence during cross-examination that the third defendant had inserted the CVL on the left of the deceased's neck. He also said that he recognised the third defendant as the only person who was attempting the lines at that time.

[64] This fact clearly supported the learned HCJ's finding regarding the third defendant. We are aware that the learned HCJ did not consider this fact in his grounds of judgment. However, pursuant to s. 69(4) of the Courts of Judicature Act 1964, this court is empowered to, among others, draw inferences of fact from the evidence appearing in the record of appeal. Section 69(4) reads:

> The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case may be.

[65] Invoking s. 69(4) of the CJA, we find that the plaintiff's evidence that the third defendant was the only one who attempted the CVL on the left of the deceased, which was not recorded in the record of the first defendant as credible evidence pointing to the negligent act of the third defendant. For that reason, we find that there is no appealable error in the decision of the learned HCJ on the issue of liability.

Quantum Of Damages

[66] On the issue of quantum, the third defendant contended that the learned HCJ had erred in allowing the following claim:

(i) loss of contribution calculated at RM5,200 a month for 16 years amounting to RM998,440;

(ii) pre-trial damages being the cost of engaging a maid of RM72,000 calculated at RM1,500 per month for 48 months;

(iii) future damage being the costs of engaging maid services at RM144,000 calculated at RM1,000 for 12 years until the plaintiff's daughter, who was six years old at the date of the judgement, reaches the age of 18; and

(iv) aggravated damages in the sum of RM500,000.

[67] The third defendant submitted that the learned HCJ had erred in awarding the above damages. It was contended that there is no evidence to support the plaintiff's claim that the deceased was earning RM1,200 as a locum. The third defendant complained that the plaintiff had not shown any document that a maid was employed nor was there a document to show the payment of salary to the maid. It was argued that the plaintiff had contributed the sum of RM500 and not RM1,000 per month in employing the maid. The third defendant also submitted that the maid was employed even before the plaintiff was married to the deceased. With regards to the award of aggravated damages, the third defendant maintained that the conduct of the third defendant is not offensive, exceptional or contumelious so as to justify an award for aggravated damages.

[68] It is trite law that damages are compensatory in nature awarded to compensate for loss sustained as a result of a civil wrong committed in breach of a duty of care. Whether such damages are recoverable or not is a matter of proof dependent on the evidence adduced during the trial (see *Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal* [2024] 6 CLJ 487; [2024] 4 MLRA 345). When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he is claims damages was caused by the defendant's wrong and that also damages is not too remote to be recoverable. Where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can (per Edgar Joseph Jr SCJ in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19; [1993] 3 MLJ 352. It is also trite that an appellate court would be slow in disturbing the amount of damages awarded by the trial court.

[69] With regards to the claim to loss of earning, we agree with the plaintiff that this claim can still be awarded to the plaintiff in the absence of documentary evidence. We were referred to the case of *Pantai Medical Centre Sdn Bhd v. Fareed Reezal Arund & Another Appeal* [2022] 2 CLJ 173; [2022] 4 MLJ 529, where the Court of Appeal had upheld the High Court's award for the loss of earnings in the sum of approximately RM3 million despite the appellant's contention that there were no documents to support the deceased's loss of earning.

[70] In this appeal, the plaintiff claims that the deceased was earning RM6,000 per month and she earned extra income of RM1,200 as a locum at some private clinic and this amount was taken into consideration by the learned HCJ as the deceased's loss of earning. The third defendant disputed the plaintiff's contention that the deceased received RM1,200 as a locum because there is no documentary proof to support this claim.

[71] We are of the opinion that the learned HCJ is justified in considering the deceased's income as a locum in assessing the loss of income. The plaintiff gave oral evidence on this claim. We have no reason to disagree with the finding of the learned HCJ and would say that it is a common knowledge that doctors, especially those serving in Government hospital, do extra work as locum at private hospitals or clinics to earn extra income. We find that the sum of RM1,200 per month is a reasonable as the amount earned by the deceased as a locum.

[72] We are also of the opinion that the plaintiff's father-in-law, Encik Repin bin Ibrahim (PW4)'s evidence had corroborated the plaintiff's claim for costs of engaging a maid to give care service to the plaintiff's daughter from the date of delivery until the date of decision. The amount awarded by the learned HCJ was RM48,000. It was admitted by the plaintiff that the maid had been employed by PW4 before the plaintiff and the

A deceased were married. However, the plaintiff and PW4 had given valid explanation as to the need of having the maid. It was explained that the parents-in-law of the plaintiff are getting old and they need the assistance of a maid to look after the daughter. We find this claim reasonable as it is also quite common that young couples also engage the assistance of a maid to look
B after their children at home whenever they work. The award of RM1,000 per month is reasonable, taking into account the minimum wage of RM1,200 per month at that material time.

[73] It is also reasonable that services of the maid are needed until the daughter is 18 years old. Considering that the plaintiff's parents-in-law are
C old and that the plaintiff is working, it is reasonable for the plaintiff to continue engaging the maid to look after the need of the daughter. Even though the learned HCJ did not explain why he awarded this claim, it is reasonable that the daughter be accorded a stable environment as she grows up.

D **[74]** The learned HCJ awarded RM500,000 as aggravated damages on the following reasons:

(i) the conduct of the third defendant in not accepting responsibility for the attempted insertion of the CVL on the left side of the deceased's neck
E which caused her to suffer embolism and a pneumothorax that materially contributed to her premature death;

(ii) such failure had caused the plaintiff and his solicitors to unnecessarily prepare for trial on liability and directly caused further aggravated harm suffered by the plaintiff.

F **[75]** In medical negligence cases, aggravated damages are normally awarded to compensate for the injury to the feelings, pride or dignity of the plaintiff. In the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427; [2018] 3 MLJ 281, the Federal Court states that there is no reason to exclude aggravated damages
G from medical negligence cases, as such cases involve real injury to a person's body. In her book *Medical Negligence In Malaysia Cases and Commentary*, 2nd edn at p. 37, the learned author, Puteri Nemie Jahn Kassim, listed the following inexhaustive examples/reasons where the courts in medical negligence cases have awarded aggravated damages:

H (i) insulting and insolent behaviour of the defendant's attitude towards the patient and family members;

(ii) arrogant attitude of the defendant causing distress and anxiety on the plaintiff;

I (iii) conduct of the defendant which is considered to be high-ended, malicious and oppressive;

(iv) inaccurate information given and dishonesty in documentation by the defendant; and

(v) suppression of the plaintiff's medical records by the defendant thereby causing the plaintiff to incur avoidable costs and expenses.

[76] In our view, the learned HCJ was correct in awarding aggravated damages to the plaintiff. While the defendants have their right to defend the plaintiff claim against them, their failure to offer any expert opinion of the "respected members of the medical profession" to negate the finding of the plaintiff's experts but at the same time trying to push the liability to other defendant show the lack of sincerity in handling the plaintiff's claim. We find no reason to disagree with the learned HCJ.

[77] However, we are of the opinion that, on the facts of this case, the award in the sum of RM500,000 for aggravated damages is manifestly high. In our view, the sum of RM100,000 is reasonable.

Conclusion

[78] Based on the above reasons, we find that the learned HCJ had not committed any plain error in his judgement. There is no merit in this appeal with regard to liability. We dismiss the third defendant's appeal on liability. However, we find that the award of RM500,000 as aggravated damages is unsustainable and we substitute it with the sum of RM100,000. We affirm the rest of the decision of the learned HCJ on quantum of damages. To that extent, the appeal on quantum of damages is allowed. We allow costs as follows, subject to allocatur:

(i) RM40,000 to the first respondent;

(ii) RM20,000 to the second respondent; and

(iii) RM10,000 to the third respondent.